NOTES ON RECENT LEADING ARTICLES IN LEGAL PERIODICALS.

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Written and Unwritten Constitutions in the United States. Emlen McClain. The statement which Mr. McClain makes, that the assumption by our courts of the power to declare legislation unconstitutional, "was probably not anticipated by the framers of the constitution," is one which he is far from the first to make. It is even often asserted that John Marshall originated the doctrine that the courts have this power. It seems strange with the printed discussions in every library, and in the most accessible and comprehensible form, that such misapprehensions obtain so much credit. Nothing could be much plainer than the remarks of Mr. Elias Boudinot, made in debate in the House of Representatives in 1789. "It has been objected," he said, "that, by adopting the bill before us, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness. I am so far from controverting this right in the judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government, which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the constitution that there is a remedy for the failures even of the legislature itself." This will serve as an example of the thought of the men of that time. We seem to be falling into a habit of judging the framers of the constitution by what some men have chosen to think they thought and said, rather than by their own spoken thought. It may well be that the courts sometimes go further than was intended, but it is rather through the abuse of the given power than the use of power not given. It is also true that the courts, the legislature, and the people may now be bewildered by finding themselves confronting the government of "dependencies;" neither courts, legislature or people ever having contemplated, or intended to place themselves in such a position. The evil here noted is the outgrowth of a condition suddenly forced upon the people during a war; a time when their rights are always largely in abeyance. The theory that we may have places and people under our power but not within the protection of the constitution, leads quite easily to the doctrine that we are evolving for these people an unwritten constitution. Refusing to them the protection of the written constitution, a civilized nation must grant to them some safeguard, so we raise the fiction of an unwritten constitution, and then say—or as Mr. McClain says—we cannot allow the courts to construe the decrees of this fictitious entity. He ends by hoping for good to come out of the evil he finds in this condition.

Specific Performance by Injunction. Clarence D. Ashley. Mr. Ashley argues that if equity cannot bring about a full performance of the contract it cannot satisfactorily or justly intervene by compelling a part performance only. If it attempts this, great injustice is likely to result. The earlier cases held to this distinction and did not attempt to do indirectly what they could not do directly. In the case

of *Lumley* v. *Guy*, however, they could not force the singer to sing, but attempted to coerce her into singing by not allowing her to sing anywhere but where she did not want to sing. This is considered to be an example of compelling part performance when unable to compel complete performance. Mr. Ashley thinks this a complete misconception of the views of Eldon and Shadwell in the earlier cases. He says, "This result is to be regretted because it leads to many cases of hardship and injustice, and equity is clearly doing indirectly that which it admits it ought not to do directly."

The Police Power and Civil Liberty. S. Whitney Dunscomb, Jr. The writer of this article seems here to take the opposite view of the question, from those who have recently tried to show that the modern judicial view of the eight-hour laws and similar legislation has a tendency to make new bonds for the individual under this very pretence of civil liberty which Mr. Dunscomb invokes. The "Ideal state of society where every member has the law within himself" seems only likely to be brought about by a long training in a society where the laws have been, by long and serious trial, brought to conform to, and lead toward, such ideals. It is not by doing away with law in the present, but by making the present law sustain the citizen where he is not yet able to stand alone, that we shall be helping along the desired era of real self-government.

Over-Production of Law. Alfred C. Coxe. There are few lawyers who do not feel the oppression of this over-production. We "concede the malady." As to the remedy, "Biennial sessions," says Mr. Coxe. Already a very large majority of the states have them; it does not seem to be helping matters much. Governors can do much, he thinks. But if governors veto only those acts among the mass presented to them which annoy them by technical and literary defects, as governors have been known to do, the majority of the most vicious measures may easily become law. Mr. Coxe's real remedy we find to be public opinion. Where else shall a democracy look for help? Self-help is the only help for a self-governing community. But the evil is not yet of such a character as to arouse the people to swift action, therefore it seems that we must continue to produce much law for some time to come.

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Theory and Doctrine of Tort. Melville M. Bigelow. Mr. Bigelow is about to give us an eighth edition of his well-known work on the Law of Tort. This article gives us some sections of this work in advance of the new publication. Mr. Bigelow's able treatment of his subjects is too well known to require comment.

The Three Departments of Government and Their Relation to Each Other. Hon. Charles E. Littlefield. Mr. Littlefield first states that less than one-fifth of our people govern the remaining millions, basing the statement on the number who took part in the recent national election. Those who believe that we have as yet a government of the people and by the people of course have their theories as to the disfranchised portion, but Mr. Littlefield does not dwell on the point. The first department to be examined is the legislative. Morris, Wilson, and Hamilton all feared that this department would swallow up the others. Mr. Littlefield may be right in thinking that these men did not "realize the potentiality of the constitution" as a repressive force.

but the sacrifices and compromises they made in forming it; their awe when they found they had accomplished their purpose, go very far to show that they foresaw its power. Mr. Littlefield feels that the populace is very fickle and unfaithful because it failed to duly absorb Mr. Roosevelt's advice and pass a drastic act for the protection of presidents. It seems that the people were less hysterical than their leaders and so they allowed what might very properly have been called "hysterical" legislation to die a natural death. The existing laws were sufficient and the people so decided. The logic of Mr. Littlefield's protest in an article apparently to protest against foolish legislation demanded by the populace is not apparent. Discussing the Executive, Mr. Littlefield finds that this department "has been, by popular discussion, vested with greater powers than the constitution allows." The President is supposed to have been placed in this position by "injudicious friends." It is pleasant to see it stated that Jackson did not assume to be a law unto himself, and that he should not be used as a precedent for the claim of extraordinary powers now made for the President by those same "injudicious friends." In alluding to the last presidential election, and the claims then made that the large vote then cast denoted approval of the extension of the powers of the executive, Mr. Littlefield says: "The overwhelming result was not caused by more votes for Roosevelt but by less for the other ticket, so that the people can hardly be said to have given an overwhelming endorsement of anything." The judicial power of the United States was believed by Hamilton to be very weak, but his opinion was not shared by some of the men about him; such sentiments as we have noted as voiced by Boudinot were evidently very strong in the minds of the firmest supporters of the constitution. Mr. Littlefield believes that the attempt to secure federal control of insurance is an effort to make the Supreme Court reverse itself, as its attitude on that point has been unswerving and unhesitating.